QUESTIONS PRESENTED

I. Whether the Eighth Amendment's prohibition against cruel and unusual punishment precludes a sentence of death imposed as the result of the personal characteristics of the victim when those traits have not been established, in any substantial and meaningful way, as an impetus for the murder?

II. Whether the South Carolina Supreme Court correctly interpreted and applied this Court's Eighth Amendment jurisprudence in *State* v. *Gathers?*

III. Whether, assuming a victim's personal characteristics are found to be a legitimate sentencing consideration, Gathers' inability under South Carolina law to rebut the prosecution's claims of good character nevertheless prohibited the solicitor's argument?

IV. Whether the solicitor's misrepresentation of the evidence relating to the victim's personal characteristics amounted to a denial of due process?

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STATEMENT OF THE CASE

A. Introduction

This case involves the solicitor's closing argument in the sentencing phase of Gathers' trial. Because of that argument, the South Carolina Supreme Court vacated the death sentence imposed by the jury:

> Appellant contends the solicitor's closing argument at the sentencing phase of trial violated *Booth* v. *Maryland*, 482 U.S. [496], 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

State v. *Gathers*, 295 S.C. 476, 369 S.E.2d 140, 143 (1988). The Court explained the basis for its decision:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. *Cf. State* v. *Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. *Accord State* v. *Gaskins*, [284 S.C. 105, 326 S.E.2d 132 (1985)] (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

Id., 369 S.E.2d at 144. In light of this holding, the Court concluded, "We need not address [his] remaining exceptions." *Id.*

B. Summary of Evidence

The victim was Richard Haynes, a black male 31 years of age at the time of his death, who, although without formal religious training, referred to himself as the "Reverend Minister" Haynes. [J.A. 6, 10]. His mother, Doro-

thy Haynes, spoke of her son during the guilt phase of the trial. "He got saved about three years ago . . . . He carry his religious item, his Bible; and he talks to people all the time about the Lord." [J.A. 5]. Apparently, though, his conversion had a darker aspect. Approximately one year later, he began to have "some mental problems" and had been "in and out of our mental hospital" on three occasions. [J.A. 4]. He was unmarried and did not have regular employment, although he did work some "odd jobs" during the month of his death, September of 1986. [J.A. 4-6].

According to Mrs. Haynes, "[H]e liked to wander around and come back. That is what he usually does." [J.A. 7]. During these wanderings, in addition to his two Bibles, he carried with him two bags containing various artifacts of personal religious significance. [J.A. 9, 10, 35]. His mother identified the Bibles (State's Exhibits 7 and 10) and two of the items, "olive oil, what he used to annoint people and pray for them" (State's Exhibit 8) and a sheet (State's Exhibit 9), and they were admitted into evidence. [J.A. 8-10; R. 9].

Haynes arrived at his mother's house on Saturday, September 13, 1986, at 8:40 p.m. [J.A. 6]. He left at 10:15 p.m. [J.A. 7]. The bicycle pathway where he died was approximately 500 yards from his mother's house. [J.A. 6].

Haynes' body was discovered at 1:00 a.m. on September 14th by 13-year-old Vitreni Brown. [R. 714, 718]. Brown also observed what "[l]ook[ed] like clothes and then papers of a Bible." [R. 718]. He went home and told his mother; she called the police. [R. 719].

Officers arrived on the scene shortly after receiving the call. [R. 768]. There they found, in addition to the Bibles, olive oil and sheet previously introduced into evidence, several other articles: rosary beads (State's Exhibit 12), a

silver razor (State's Exhibit 13), "a brown wallet containing miscellaneous paper, Social Security cards and other papers" (State's Exhibit 14), loose "religious cards," including "The Game Guy's Prayer" (State's Exhibit 15), a "wine cooler" carton (State's Exhibit 16), two small white angel replicas (State's Exhibit 17), loose "personal papers" including Haynes' voter registration card (State's Exhibit 19), and a check made out to a local grocery store (State's Exhibit 20). [R. 9, 768-788]. These items were admitted into evidence during the testimony of crime scene technician Anthony Hazel. [*Id.*].

The prosecution's key witness was Esdavan Duval "Steven" Hardrick. He testified that he, Gathers, Dyonzoria Brown and Zandell Hayes, all black youths, spent the evening hours of September 13th wandering about an area which included the bicycle pathway. [J.A. 11-15]. Hardrick and his friends often "hung out" at a particular bench on the pathway drinking beer and smoking marijuana. [J.A. 11, 31].

Later that night, "about 8:00 or 9:00," the four bought a 12-pack of beer and made their way to the bench, drinking as they walked. [J.A. 15-16]. There is no indication that they were out seeking someone to harm, or that they anticipated or desired the tragic escalation of events shortly to follow.

As the youths approached, they observed a man they did not know (Haynes) standing by the bench. [J.A. 16-17; R. 867, 891-893]. The area was not lighted, but it looked to Hardrick "like he was pulling up his pants." [J.A. 17]. Haynes sat down on the bench with his Bible and "some paper." [J.A. 17, 26]. He was drinking a wine cooler and another was sitting on the bench. [R. 607].

> When we came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drink-

ing our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he [Haynes] said he didn't want to talk to him at the time. . . . I saw him hit the man with his fist. . . . [H]e fell back. When he fell back, he fell more or less into Zandell Hayes. And at that time he [Haynes] went wild. . . . After that, Zandell Hayes had hit the man. . . . Then he [Haynes] kind of like moved up the bike path, and him and Demetrius was fighting. . . . [T]hey were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground. . . . After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times. . . . He hit him with his foot and with his fist. . . . [T]hen after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice. . . . Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times. . . . I believe he [Haynes] was saying, "Oh, Lord." . . . I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all right.

[J.A. 18-22].

Hardrick looked through the contents of one of Haynes' bags, but found nothing he wanted. [J.A. 34-35]. Next, Gathers went through his things: "[W]hen he went through his belongings he started throwing things about, just throwing them everywhere, looking through things." [J.A. 27]. After about a minute of this, Gathers took Dyonzoria's umbrella and began hitting Haynes "about in his back and his head." [J.A. 24, 28].

> At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking through there we could look back and see the bike path and see that Demetrius and the guy—well Demetrius was still hitting the guy—. . . [T]he guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he got the umbrella and stuck that up the man's behind. . . . [He] [u]sed the top end of the umbrella. . . . I believe he [Haynes] was groaning at the time. . . . After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is when he ran and rejoined up with us.

[J.A. 22-26].

At the apartment complex, they met up with four friends, James Carter, Jerome Heyward, Rosemary Campbell and her brother, Hodges Campbell. [R. 667-701]. Carter described their behavior: "[Dyonzoria] Brown was talking about he was strictly business, he wasn't taking no more mess from anybody. And so, you know, they started telling us about they messing up someone on the track, the bike path which we call the track. And they started telling us, they said something about they was beating him up or something." [R. 670]. Zandell said, "Come on, MiMi [Gathers], let's go kill him." [*Id.*].

According to Hardrick, the four youths headed back out to the pathway. [J.A. 28]. Zandell went first. [J.A. 29]. Gathers followed approximately one minute later. [J.A. 30]. On the way, Hardrick and Dyonzoria decided instead to go to Rosemary Campbell's house. [J.A. 28]. Zandell rejoined them approximately two minutes later. [J.A. 30]. Three to five minutes later, Gathers reappeared. [*Id.*]. "[W]hen Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us." [J.A. 36].

Gathers gave two statements to the police. In the first, he asserted an alibi. [R. 865-867]. In the second, he claimed he had hit Haynes "two times in the chest" and had poured beer in his face "to try and wake him up," but he denied inflicting further injuries with fist, knife or umbrella. [R. 889-893].

The jury found Gathers guilty of murder and criminal sexual conduct in the first degree in the first phase of the trial. [J.A. 1; R. 1135].

On motion of the solicitor, "all the testimony and exhibits adduced and produced at [the] guilt phase" were admitted into evidence in the sentencing phase. [R. 1167]. That accomplished, the prosecution rested its case. [R. 1168].

In his sentencing phase summation, the solicitor argued, in relevant part:

> This defendant, Demetrius Gathers—and if you were to decide this case based on sympathy—and, of course, that is not the way to do it—but looking at Revered Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.
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> * * *
>
> And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belong-

> ings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. But look at Reverend Minister Haynes' prayer. It's called The Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, Oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who were out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf and sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along.

He was prepared to deal with the tragedies that he came across in his life.

* * *

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally. Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign supreme on that public bench.

[J.A. 39–44].

Next, defense counsel argued, in relevant part:

> I wish there was some way that Ricky Haynes could speak to us, but that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into that jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The clear implication is that he was a Christian. I ask you to think about what the implications of that Christian faith were and are and will be in the future. . . . All of us are searching for the truth, all of us are looking for justice. Part of the search for justice requires compassion and mercy. . . . The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant? . . . You are answerable only to God, the God of us all. Blessed are the merciful.

[J.A. 45-46].

After the trial judge's final instructions, the jury recommended that Gathers be sentenced to death by electrocution, having found that the murder was committed while in the commission of criminal sexual conduct in the first degree. *See* Section 16-3-20 of the *South Carolina Code of Laws* (1976, as amended). [R. 1246]. The judge sentenced him to death for the murder and a consecutive term of imprisonment for thirty years for criminal sexual conduct. [R. 1260].

SUMMARY OF ARGUMENT

At the broadest level, the resolution of this case depends upon whether the Eighth Amendment's prohibition against cruel and unusual punishment tolerates a sentence of death imposed as the result of the personal characteristics of the victim (for example, his psychological makeup, his moral orientation, his economic status, or a combination of such factors) when those traits have not been established, in any substantial and meaningful way, as an impetus for the murder. Technically speaking, the question at this level is whether these characteristics are, in and of themselves, a "circumstance of the crime."

An affirmative answer would effect a revolutionary and fundamental reworking of the basic concerns and focus of this Court's Eighth Amendment jurisprudence since *Furman* v. *Georgia*, 408 U.S. 238 (1972). During this period, the Court has heretofore limited a capital defendant's "criminal culpability" to factors bearing upon his "personal responsibility and moral guilt." *Enmund* v. *Flor-*

ida, 458 U.S. 782, 801 (1982). "[R]ace, religion, or political affiliation" have been held to be "constitutionally impermissible [and] totally irrelevant" to the sentencing process. *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983).

Allowing the sentencing decision to depend upon the victim's personal characteristics, when there exists no apparent nexus between those traits and the defendant's decision to kill, cannot be reconciled with these salutary principles. The decision to impose a death sentence would become instead a function of such arbitrary and irrelevant factors as the race, wealth, celebrity or beliefs of the victim.

In *Gathers*, the South Carolina Supreme Court unambitiously read *Booth* as an equally unambitious application of settled Eighth Amendment law. The Court vacated Gathers' death sentence because the solicitor told the jury that death was warranted for no other reason than simply because "the victim was a religious man and a registered voter." *Gathers*, 369 S.E.2d at 144. The prosecution did not establish or claim a nexus between Haynes' personal characteristics and Gathers' decision to kill.

At a more immediate level, this Court's disposition of the case must also be informed by two additional factors. The first involves a rule of law apparently peculiar to South Carolina. The second involves the solicitor's deviation from the evidence and its reasonable inferences in his closing argument.

In South Carolina, the defense may not attack the worth of a victim in the penalty phase of a capital trial, whether through the introduction of negative evidence or by argument. *State* v. *Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985). Since the defense was unable to respond to the solicitor's closing argument in kind, the sentence of death

ran afoul of "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'." *Skipper* v. *South Carolina*, 476 U.S. 1, 5 n. 1 (1986), quoting *Gardner* v. *Florida*, 430 U.S. 349, 362 (1977). It also violated the Eighth Amendment's prohibition against precluding a defendant from offering relevant evidence or argument in mitigation. *Skipper; Eddings* v. *Oklahoma*, 455 U.S. 104 (1985).

Finally, the inability of the defense to challenge the victim's character under state law in no small measure aided the solicitor in consistently and dramatically misrepresenting the evidence of the victim's personal characteristics and beliefs. This "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974).

ARGUMENT

A. The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment Precludes A Sentence Of Death Imposed As The Result Of The Personal Characteristics Of The Victim When Those Traits Have Not Been Established, In Any Substantial And Meaningful Way, As An Impetus For The Murder. In *State* v. *Gathers*, The South Carolina Supreme Court Merely Read *Booth* v. *Maryland* As Authority For This Principle. [Questions Presented I and II].

In *Booth* v. *Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 2533, 96 L.Ed.2d 440 (1987), this Court wrote that the "Victim Impact Statement" (VIS) in the case "provided the jury with two types of information." In fact, the VIS revealed three separate and distinct types of information. First, the VIS "described the personal characteristics of the victims." *Id.* Second, it described "the emotional

impact of the crimes on the family." *Id.* Third, it set forth "the family members' opinions and characterizations of the crimes and the defendant." *Id.* The emphasis of the VIS was, however, on the first two categories, "the emotional trauma suffered by the family and the personal characteristics of the victims." *Id.*

The sentencing authority in a capital trial should not be permitted to rely upon the victim's personal characteristics or the impact of the killing upon the survivors, the majority reasoned, because "[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant." *Id.*, 107 S.Ct. at 2534.

> As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. . . . Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.

Id. (footnotes omitted).

The majority did allow that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." *Id.*, 107 S.Ct. at 2535 n. 10.

The dissenters in *Booth* were of the view that the circumstances of a crime necessarily encompassed the loss suffered by the victim's family and his community. "The affront to humanity of a brutal murder such as petitioner

committed is not limited to its impact on the victim or victims; a victim's community is also injured, and in particular the victim's family suffers shock and grief of a kind difficult even to imagine for those who have not shared a similar loss." *Id.*, 107 S.Ct. at 2539 (White, J., dissenting). "To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted." *Id.*, 107 S.Ct. at 2542 (Scalia, J., dissenting). *See*, also, *Mills* v. *Maryland*, 486 U.S. ___, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (Rehnquist, C.J., dissenting) ("Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances, yet the state is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide. If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant.").

If the dissents in *Booth* and *Mills* provide an accurate indication, a majority of this Court may now feel that the impact of a victim's death upon his community and family is an appropriate sentencing consideration. *Mills*, 108 S.Ct. at 1875 (Rehnquist C.J., dissenting); *Booth*, 107 S.Ct. at 2539 and 2542 (White and Scalia, JJ., dissenting). Although that question is not presented by this case, it may be supposed that its ultimate resolution will involve defining the degree of foreknowledge of that impact a defendant must possess. *See*, e.g., *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Enmund* v. *Florida*, *supra*.

This would not have been an issue in *Booth* and *Mills*. Booth knew his victims, an elderly couple who could identify him, and that is why he killed them. *Booth*, 107 S.Ct. at 2530. Similarly, Mills murdered his cellmate after having threatened to do so several weeks earlier if numerous unspecified "demands" were not met by the prison warden. *Mills*, 108 S.Ct. at 1873 (Rehnquist, C.J., dissenting). In both cases, the defendants were acquainted with their victims prior to the murders, and the relationships significantly influenced their decisions to kill.

The South Carolina Supreme Court vacated Gathers' death sentence becuase the solicitor argued that Haynes' personal characteristics justified the imposition of that penalty. No error was found in his references to the impact of Haynes' death upon his family:

> This defendant, Demetrius Gathers—and if you were to decide this case based on sympathy—and, of course, that is not the way to do it—but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way.
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> * * *
>
> [W]ith little thought, with not thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, [Gathers] goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully . . . .

[J.A. 39, 41].

The defense also suggested that social and family suffering militated against a death sentence: "The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" [J.A. 46].

A victim's personal characteristics, on the other hand, are not consequences of a murder. They exist apart from the defendant's intervention. If unknown or otherwise irrelevant to the decision to kill, they fail to illuminate the defendant's personal responsibility and moral guilt. The goal of such evidence and argument is to accomplish precisely the opposite effect, to shift the attention of the sentencing authority away from the defendant.

Its purpose, as the *Booth* majority correctly recognized, is to obtain a death sentence for no other reason than the sentencing authority's "perception that the victim was a sterling member of the community." *Booth*, 107 S.Ct. at 2534. Allowing the sentencing decision to depend upon such factors, when there exists no meaningful and significant nexus between those traits and the defendant's decision to kill, cannot be reconciled with the basic concerns and focus of this Court's Eighth Amendment jurisprudence since *Furman*.

Since the punishment of death is "a punishment different from all other sanctions in kind rather than degree," *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* The discretion of the sentencing body must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153 189 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion." *Zant* v. *Stephens*, *supra*, 462 U.S. at 885 (1983), quoting *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977).

Accordingly, this Court has required the sentencing authority to focus upon the character and record of the defendant and the circumstances of the crime determining the sentence. *California* v. *Ramos*, (1983); *Zant; Eddings* v. *Oklahoma, supra; Godfrey* v. *Georgia*, 446 U.S. 420 (1980) (plurality opinion); *Lockett* v. *Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Woodson; Gregg*. While mindful of "the wide scope of evidence in argument allowed at presentence hearings," *Zant*, 462 U.S. at 886, citing *Gregg*, 428 U.S. at 203-204, the Court has, on the other hand, heretofore carefully limited a capital defendant's "criminal culpability" to factors bearing upon "personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. These factors must be clear and objective. *Zant; Godfrey; Lockett; Proffitt* v. *Florida*, 428 U.S. 242 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *Woodson*. Factors such as "race, religion, or political affiliation" are impermissible in the capital sentencing process. *Zant*, 462 U.S. at 885.

It is incorrect to say, as does Petitioner, that the South Carolina Supreme Court has "misconstrued" *Booth*. [Brief of Petitioner 41]. In *Gathers*, the Court read *Booth* as a logical application of these settled Eighth Amendment principles, nothing more.

The death sentence was vacated because the solicitor told the jury that Haynes' personal characteristics "cried out" for the execution of Gathers. [J.A. 43]. The extensive references to Haynes and his beliefs cannot be dismissed as a mere "thumbnail sketch . . . of the life [the defendant] choose to extinguish." *Mills*, 108 S.Ct. at 1876 (Rehnquist, C.J., dissenting).

Gathers did not know his victim and could not know, or reasonably have been charged with, knowledge of the

character traits enumerated by the solicitor. He had not been seeking out a victim; events had simply escalated in the darkness of the bicycle pathway in tragic and unpredictable fashion. The solicitor did not rely on or attempt to suggest a connection between Haynes' personal characteristics and the degree of Gathers' personal and moral accountability.

Gathers should be executed, the solicitor claimed, simply because Haynes was a "good game guy, a saint in the game of life." [J.A. 42]. He was a religious person. [J.A. 41]. He had "mental problems" and was unable to keep a regular job. [J.A. 42]. "And he wasn't blessed with fame and fortune. And he took things as they came alsong. He was prepared to deal with tragedies that he came across in his life." [J.A. 42-43]. He was a registered voter, which, the solicitor suggested, "Speaks a lot about Reverend Minister Haynes." [J.A. 43]. He believed "in this community" and in the United States of America. [*Id.*]. He believed in the legal system, a system that would protect him by executing "the likes of Demetrius Gathers." [J.A. 43-44].

Execution of Gathers was warranted, the solicitor urged, because Haynes was a devout Christian and a participant in the democratic political process. Aside from the irrelevance of these characteristics to Gathers' "criminal culpability," they are the precise sentencing factors condemned by this Court in *Zant*.

While the Court has allowed a wide range of evidence and argument in the sentencing phase, reliability has heretofore been assured by a consistent focus upon the defendant's personal and moral accountability for the murder and the elimination of irrelevant or discriminatory evidentiary variables. If the "circumstances of the

crime" were to include the personal characteristics of the victim, where those traits have played no meaningful and significant part in the defendant's decision to kill, the decision to impose a death sentence would become instead a function of such factors as the race, wealth, celebrity or beliefs of the victim. Sound Eighth Amendment jurisprudence rejects such an unwarranted and deleterious development.

B. If A Victim's Personal Characteristics Are Found To Be A Legitimate Sentencing Consideration, Gathers' Inability Under South Carolina Law To Rebut The Prosecution's Claims Of Good Character Nevertheless Prohibited The Solicitor's Argument. [Question Presented III].

If a victim's personal characteristics are a legitimate sentencing consideration in a capital trial, the defendant must be allowed to rebut evidence and claims of good character advanced by the prosecution. On this, the majority and dissenters in *Booth* agreed:

> [I]f the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence. . . . Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family.

Booth, 107 S.Ct. at 2535 (*dictum*) (footnote and citations omitted). "No doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement. . . ." *Id.*, 107 S.Ct. at 2541 (White, J., dissenting). The dissenters quickly pointed out that "Maryland has in no way limited the right of defendants in this regard." *Id.*

The right has its origins in two sources. First, there is the "elemental [Fourteenth Amendment] due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Skipper* v. *South Carolina*, *supra*, quoting *Gardner* v. *Florida*, *supra*. Second, this Court's Eighth Amendment jurisprudence would permit a defendant to introduce evidence of the victim's bad character in mitigation. *Skipper*; *Eddings* v. *Oklahoma*, *supra*; *Lockett* v. *Ohio*, *supra*.

Unlike Maryland, South Carolina has judicially promulgated a rule of law preventing a defendant from attacking the worth of a victim in the penalty phase of a capital trial. *State* v. *Gaskins*, *supra*. If, as in this case, the solicitor eulogizes the victim in his summation, he does so without fear of contradiction, for *Gaskins* effectively precludes the defense from challenging the accuracy of his claims.

The solicitor argued that Haynes was deeply religious and a good citizen, a "good game guy, a saint in the game of life." [J.A. 42]. As discussed in the follwing section, the solicitor consistently and repeatedly misrepresented the testimony and exhibits relating to Haynes' personal characteristics. Limited by *Gaskins* to the prosecution's evidence and prevented from arguing its darker implications, the defense could assert unconvincingly that Haynes, because of his positive attributes, would have wanted Gathers to be sentenced to life imprisonment:

> I wish there were some way that Ricky Haynes could speak to us buy that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into the jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The

> clear implication is that he was a Christian. I ask you to think about what the implications of that Christian faith were and are and will be in the future.

[J.A. 45].

In *Gardner*, this Court stated, "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360. The effect of *Gaskins* removes the opportunity for adversarial comment. As a result, the reliability of the sentencing decision is undermined.

In *Gathers*, the South Carolina Supreme Court acknowledged the constitutional ramifications of *Gaskins*, holding that its disapproval of the solicitor's closing argument accorded with that decision. *Gathers*, 369 S.E.2d at 144. *Cf. Skipper*, 476 U.S. at 11 (Powell, J., concurring) ("I see no reason why a State could not . . . exclude evidence of a defendant's good behavior in jail following his arrest, so long as the evidence is not offered to rebut testimony or argument . . . tendered by the prosecution.").

The solicitor's closing argument was simply impermissible in this case. A determination that the South Carolina Supreme Court incorrectly interpreted the Eighth Amendment would not alter this conclusion. Gathers' inability under South Carolina law to contest the solicitor's assertions of Haynes' good character was incompatible with the right to present evidence in rebuttal and mitigation, regardless of whether a victim's personal characteristics are found to be a legitimate sentencing consideration.

C. The Solicitor's Misrepresentation Of The Evidence Relating To The Victim's Personal Characteristics Amounted To A Denial Of Due Process. [Question Presented IV].

There remains one final problem distinct from the appropriateness of the solicitor's closing argument under the Eighth Amendment and the inability of Gathers to rebut the argument under South Carolina law. The problem involves the solicitor's repeated and consistent misrepresentation of the testimony and exhibits relating to the personal characteristics of the victim.

This Court has been particularly critical of closing arguments in which the prosecutor misrepresents evidence or the procedures of capital sentencing. *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985); *Miller* v. *Pate*, 386 U.S. 1 (1967). In addition, the Court has held that appeals to factors such as race, religion or political affiliation are irrelevant and constitutionally intolerable. *Zant* v. *Stephens*, *supra*.

In this case, the solicitor stated that Haynes was religious, mentally troubled and "[u]nable to keep a regular job." [J.A. 41-42]. Haynes' mother testified to these facts. [J.A. 4-5]. However, the balance of the solicitor's portrait of Haynes was his own creation.

From the exhibits, he selected a preprinted prayercard, "The Game Guy's Prayer." [J.A. 41-42]. He read the prayer to the jury in its entirety, asserting that Haynes was "a sport in this little game of life . . . a good game guy, a saint in the game of life." [J.A. 42]. Furthermore, Haynes "took things as they came along. He was prepared to deal with tragedies that he came across in his life." [J.A. 43].

Next, the solicitor turned to the voter registration card, which, he said, "Speaks a lot about Reverend Minis-

ter Haynes. Very simple yet very profound." [*Id.*]. It revealed to the solicitor that Haynes believed "in this community [and] took part," that he believed in "the United States of America" and its legal system, a system that would protect him by executing "the likes of Demetrius Gathers." [J.A. 43-44].

In truth, there was no evidence that Haynes resembled the anonymous protagonist of "The Game Guy's Prayer." Since Haynes also carried about two Bibles, it would have been just as fair for him to have been described by the solicitor as "Job-like" or "Christ-like;" in other words, ownership did not support the argument of kinship.

At least the prayer-card was in evidence. The solicitor's description of Haynes' personal philosophy for dealing with the vagaries of day-to-day existence was apparently manufactured out of thin air, for the record discloses no basis for his claims. Similarly, there was no evidence of Haynes' political views, particularly his opinions about the legal system and how it ought to operate.

In *Donnelly* v. *DeChristoforo*, *supra*, the Court cautioned: "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *DeChristoforo*, 416 U.S. at 647. In this case, the solicitor's remarks were explicit, extensive and their import was unmistakable. *Cf. Caldwell*, 472 U.S. at 340 (Here . . . the prosecutor's remarks were quite focused, unambiguous, and strong."). By manipulation of the evidence and outright fabrication, he sought to create "the perception that the victim was a sterling member of the community." *Booth* v. *Maryland*, *supra*, 107 S.Ct. at 2534.

The relevant question is whether the solicitor's improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *DeChristoforo*, 416 U.S. at 643. As the South Carolina Supreme Court correctly noted, the solicitor's "extensive" comments "conveyed the suggestion [Gathers] deserved a death sentence because the victim was a religious man and a registered voter." *State* v. *Gathers*, 369 S.E.2d at 144. Thus, the solicitor not only misrepresented the evidence, he did so in a fashion that placed before the jury factors held irrelevant and constitutionally impermissible in Zant, that is, religion and political affiliation.

In addition to the nature of remarks themselves, the Court has considered whether the jury was given a curative instruction, *Darden* v. *Wainwright*, 477 U.S. 187 (1986); *Caldwell; DeChristoforo*, whether the argument was responsive to the defense summation, *Darden; Young* v. *United States*, 470 U.S. 1 (1985), whether the defense was able to rebut the prosecutor's assertions, *Darden*, the weight of the evidence against the accused, *Darden*, and the brevity of the comments in the context of the argument as a whole. *DeChristoforo*.

These factors support a finding of error. The jury was never instructed that the arguments of counsel were not evidence. Since the solicitor argued first, the remarks were not in response to defense claims. The defense was prevented from rebutting these averments by *State* v. *Gaskins*, *supra*. Finally, while the evidence of Gathers' participation in the crimes may have been "overwhelming," *Gathers*, 369 S.E.2d at 143, the degree of his personal and moral accountability was less certain.

To be sure, closing argument is the canvas of the advocate and is not limited by "debating society rules as to

relevancy." *Caldwell*, 472 U.S. at 350 (Rehnquist, J., dissenting). However, this Court has never licensed the misrepresentation of evidence or appeals to irrelevant and constitutionally impermissible factors. The solicitor's argument in this case was fundamentally incompatible with due process of law.

CONCLUSION

This brief has presented and addressed three compelling reasons why this Court should affirm the decision of the South Carolina Supreme Court in *State* v. *Gathers*, *supra*. First, the solicitor's reliance on the victim's personal characteristics in closing argument violated the Eighth Amendment. Second, South Carolina law prevented Gathers from rebutting the solicitor's claims. Third, the solicitor misrepresented the evidence of the victim's characteristics. Each factor progressively undermined the reliability of the sentencing determination. The South Carolina Supreme Court correctly vacated the sentence of death in this case.

Respectfully submitted,

JOSEPH L. SAVITZ, III
Assistant Appellate Defender
WILLIAM ISAAC DIGGS
Chief Attorney
SOUTH CAROLINA OFFICE OF
APPELLATE DEFENSE
1122 Lady Street, Suite 301
Columbia, SC 29201
803-734-1330
Counsel for Respondent